In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER,
v.
THE UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO REMAND

STATEMENT

After this matter is in this Court upon the granting of the petitioner's application for a writ of certiorari to review the conclusion of law of the Court of Claims, and after the respondent has filed a brief in reply to the petitioner's specification of errors of law made below, the respondent

now files a motion that the cause be remanded to the Court of Claims to find further facts. The motion is in the alternative "in the event that this Court is of the opinion that the decision of the Court of Claims should not be affirmed upon the record as presented to this Court."

Respondent declares that the Court of Claims did not find relevant and material facts, in the record, as follows:

> "(1) That petitioner designed the batteries with respect to which excise taxes were paid for the special purpose of being used to replace a component part for automobiles;
>
> "(2) That petitioner's business policy was to cater to the needs of automobile and motor-truck owners for replacement batteries.
>
> "(3) That the term 'automobile storage battery' is used in trade parlance."

The petitioner begs leave to oppose this motion on the following grounds.

ARGUMENT

I

RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE IT SEEKS REVIEW OF QUESTIONS OF FACT AND NOT OF LAW

The purpose of the rules of this Court (Rule 41) is to bring here from the Court of Claims for review nothing but questions of law. (*Lucken-*

back S. S. Co. v. *U. S.*, 272 U. S. 533.)

The respondent, after opposing the grant of certiorari, now, by recitation and citations from testimony not of record before this Court and even from the evidence in a case which is not before this Court, complains of the sufficiency of the findings below. This complaint is made notwithstanding the fact that the findings made below may fairly be said to be "direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they or any of them are ill-founded in point of law." (*Luckenback S. S. Co.* v. *U. S.*, 272 U. S. 533.)

A very careful reading of respondent's motion fails to settle the question whether the respondent may not now be urging for the first time all, or some, of the complaints made against the Court of Claims' interpretation of the evidence below. In the absence of a demonstration that these specific objections to the evidence were presented to the Court below for correction, it is submitted that these contentions may not now be raised upon review. *U. S.* v. *James Driscoll*, 95 U. S. CLIX (24 L. ed. 596); *Mahan* v. *U. S.*, 14 Wall. (81 U. S. 109.)

If, on the other hand, the implication intended to be drawn from respondent's motion in the Court of Claims (quoted in full on pages 7 and 8 of the respondent's motion in this Court) is that respondent not only urged all these complaints in its exceptions filed to the report of the Commissioner of the Court of Claims, but again called the attention of that Court to them after the Court had announced its findings, adopting substantially

the Commissioner's report, the character of the respondent's present effort is exposed. The respondent is merely pressing for the third time interpretations of the evidence to which the Court of Claims, acting as a jury, could not assent.

Hence, either the respondent is now pressing upon appeal new matters not raised below, or respondent is asking this Court to review the evidence in two cases without the record in either before it, and decide whether such evidence warranted findings which the Court of Claims upon two occasions, apparently, has refused to reach. While the petitioner would have little to fear from the review of all the evidence in the two records cited in respondent's motion and could designate repeated and specific evidence below to support the rejection by the Court of Claims of the findings requested by the respondent, the process would place upon this Court the very burden which its rules are so obviously designed to avoid in these Court of Claims cases. If this Court would adhere to its established practice and avoid a precedent that the strategic maneuver for the respondent to a writ of certiorari is to secure a return of the case to the Court below in order that he may mend his hold, the respondent's motion should be denied.

II

NONE OF THE FINDINGS REQUESTED ARE MATERIAL TO THE CORRECT DECISION OF THIS CASE

A. With respect to the request that it be found that the petitioner catered to the needs of auto-

mobile and motor truck owners, the findings of fact of the Court of Claims to the effect that petitioner's storage batteries could be used on automobiles and were used on automobiles clearly carries the implication that the petitioner sought, along with other markets, the automobile trade. With the essence of this requested finding already in the record it is difficult to see what would be accomplished by remanding the case to include it merely in other terms.

B. With respect to the request that it be found that trade parlance includes the term "automobile storage battery" it should be perfectly clear from the findings of the Court of Claims that no such trade term, if it did exist, could be applied to the petitioner's batteries which were employed in such widely diversified uses as "motor boats, farm tractors, farm lighting plant, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer camp lighting, for door-bells, in railway switches and for wireless, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph and fire alarms, and electroplating." Indeed the various uses of petitioner's batteries described in respondent's own motion (pp. 4 and 5) indicate why the Court of Claims refused to find the use in trade parlance of the term "automobile storage batteries" as having any relevancy to the petitioner's product. Even the respondent does not suggest that the trade term alleged to exist has any reference to petitioner's batteries. The respondent goes even further in the brief heretofore filed on the merits and some effort is

expended (pp. 11, 14, 15 of that brief) to show that the nomenclature of the trade is immaterial to this case.

In view of the inconsistency that would exist between the findings properly made by the Court below and the addition now proposed; in view of the absence of any indication, or allegation, that the term cited has any relevancy to the batteries here in question; and in view of the judicial determination in *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2nd) 320, that there is no such term as "automobile storage batteries" in the nomenclature of the trade, it is submitted that the remanding for the purpose of including the finding requested could result only in a finding which would be irrelevant to the issue or be inconsistent with the unchallenged findings already properly made in this case.

C. With respect to the respondent's request that it be found that petitioner designed its batteries for the special purpose of being used to replace a component part for automobiles, we resist the temptation to quote from the evidence below but not of record before this Court to demonstrate that this was not the fact. We, therefore, at once, submit that the presence, or absence, of this finding is immaterial.

As developed on pages 14 to 17 of the petitioner's brief heretofore filed in this case, the terms used in the taxing statute itself indicate that articles of the general commercial importance of storage batteries could hardly be included in "parts and accessories" when adequate terms for such inclusion were immediately at hand and

when articles of much less significance were specifically named in the statute. If this be correct, it is immaterial for what purpose the petitioner designed its batteries or with what intentions the petitioner sought their sale.

It is upon the respondent's own ground of "usage," however, that the immaterial character of the proposed finding may best be demonstrated. The rule of this Court we believe to be:

> If the article in question is commonly, practically and generally used upon a given device it is a part of that device, *provided*, it is not commonly, practically and generally used for other purposes and in other devices.

(See *Maillard* v. *Lawrence*, 57 U. S. (16 How.) 251; *Hartranft* v. *Langfeld*, 125 U. S. 128; *Worthington* v. *Robbins*, 139 U. S. 337; *Cadwalader* v. *Wanamaker*, 149 U. S. 532; *Walker* v. *Seeberger*, 149 U. S. 541; *Hartranft* v. *Meyer*, 149 U. S. 544; *Magone* v. *Heller*, 150 U. S. 70; *Sonn* v. *Magone*, 159 U. S. 417; *Magone* v. *Wiederer*, 159 U. S. 555.)

If this be a correct statement of the usage doctrine then, as soon as the Court of Claims found that the kind of batteries sold by the petitioner were used in "motor boats, farm tractors, farm lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer-camp lighting, for door-bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones,

telegraph and fire alarms, and electroplating" and then, in addition to these facts, found that the petitioner "sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and has no means of knowing at the time of sale for what purposes its batteries will be used," the usage rule was satisfied and a finding for this petitioner was required.

That the identical argument, which the respondent now contends is material, has been considered by this Court and rejected because immaterial, appears in two of the decisions of this Court. In *Worthington* v. *Robbins*, 139 U. S. 337, the identical question of the importance of design, intended use and sale was before this Court. In that case a substance known as "white hard enamel" was imported admittedly intended and designed for use in surfaces of watch dials. Before, however, the material could be used for any practical purpose, it was necessary to grind and pulverize it and apply additional processes of manufacture. The form and condition of the merchandise as imported, afforded no evidence or indication of the particular use to which it was to be applied.

The issue was whether the material was "watch materials" under the Tariff Act, or an article "manufactured in whole or in part, not herein enumerated or provided for."

Mr. Justice Blatchford, denying that the article was "watch materials," says that the article in question

> "is used for various purposes, including the making of faces or surfaces of watch-

dials, scale-columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes when a smooth or enameled surface is desired. It thus appears that it was not used exclusively for the making of faces or surfaces of watch-dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials and was in fact so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used."

In that case we have this Court disregarding design and intent of the seller and determining the question on the ground whether any common, general and profitable uses actually are made of the article for other purposes than the one in question. Where such various uses exist, there can be nothing in the design which restricts the article to a single use.

In *Magone* v. *Wiederer*, 159 U. S. 555, pieces of glass with beveled edges were imported. The importer claimed that they were "parts of clocks." The Collector claimed they were "articles of glass, cut, engraved." Evidence showed that the glass had been ordered from abroad, designed, cut and manufactured to sizes for the special purpose of being used for clocks, and beveled so as to be ready for fitting into the frames of clocks, as a regular course of business, which had been continuing for some time, between the glass manufacturer and the importer. There was evidence tending to show that like pieces of glass were sometimes used by

manufacturers of hand mirrors, carriage manufacturers, lamp makers and for other objects. The Collector requested the Court below, in substance, to find in favor of the Collector unless the evidence showed that the pieces of glass in controversy were used absolutely and exclusively for clocks and no other purpose. The Court, below, cognizant of the law as laid down by this Court, charged in part:

> "The Supreme Court in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute * * *.' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have *several uses to which they are perfectly applicable*, then

as to those articles your verdict should be for the defendant." (Emphasis supplied.)

Chief Justice White's opinion approved that charge and declared that if the articles in question were "commonly, practically, and profitably used" for various other purposes they were not parts of clocks.

From these decisions it should be clear that the intentions of the seller and his efforts to reach a particular market are of no importance if the general market for the product is, in fact, a varied one. Design is of importance only if it be restrictive or limiting. That is, if the design restricts the article in question to use in a certain device, it is a part of that device: if the design is not restrictive and the article actually has common, practical and profitable uses other than in the one device, it is not a part of that device.

No suggestion is made by the respondent that the design of petitioner's batteries restricted them to use in automobiles. In fact when, in respondent's motion, counsel say "The same battery shown in the circular for automobiles can be used for farm light, radio, truck, tractor and telephone signal," they most effectively indicate that they advance no claim that the design of the petitioner's batteries was restrictive. At the same time they demonstrate clearly why the Court of Claims refused so to find. Without the restrictive feature, design is of no consequence. Hence, a remanding to the Court of Claims to assert an immaterial fact, even if the record would support such a finding, is an idle procedure.

CONCLUSION

Because the respondent is asking this Court to function in the burdensome manner which its rules directly seek to avoid; because the request of the respondent to remand, even if resulting in the findings requested by the respondent, would not materially affect the question before this Court; and because the findings of fact made by the Court of Claims are adequate, unambiguous, responsive to the issues, well founded in point of law, and affirmatively require a judgment for the petitioner; it is prayed that respondent's motion be denied.

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